

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23rd day of August, two thousand and six.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. DENNIS JACOBS,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Mohammed Jafar Ullah, _____
_____*Petitioner,*

-v.-

No. 04-3703-ag (L);
04-6189-ag (Con)
NAC

Michael Chertoff,¹ in his capacity as Secretary of the Department of Homeland Security, Department of Homeland Security, Bureau of Immigration & Customs Enforcement,
Respondents.

¹Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Secretary of the Department of Homeland Security, Michael Chertoff, is automatically substituted for former Secretary Thomas Ridge as the respondent in this case.

1 FOR PETITIONER: Michael A. Zimmerman, New York, New York.

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3 FOR RESPONDENT: Michael J. Garcia, United States Attorney for the Southern District
4 of New York, Edward Scarvalone, Andrew W. Schilling, Assistant
5 United States Attorneys, New York, New York.
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8 UPON DUE CONSIDERATION of these petitions for review of decisions of the Board
9 of Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED that
10 the petitions for review are DENIED.

11 Mohammed Jafar Ullah petitions for review of the BIA’s June 2004 denial of his motion
12 to reopen his removal proceedings as well as the BIA’s October 2004 denial of his motion to
13 reconsider the denial of his prior motion to reopen. We presume the parties’ familiarity with the
14 underlying facts and procedural history of the case.

15 This Court reviews the BIA’s denial of motions to reopen and reconsider for abuse of
16 discretion. *See Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005) (per curiam); *Jin Ming Liu v.*
17 *Gonzales*, 439 F.3d 109, 111 (2d Cir. 2006). The 90-day filing deadline for filing motions to
18 reopen may be tolled in order to avoid inequitable circumstances, such as when a petitioner has
19 suffered ineffective assistance of counsel. *Iavorski v. United States INS*, 232 F.3d 124, 129, 134
20 (2d Cir. 2000). Equitable tolling is permitted until the fraud or concealment is, or should have
21 been, discovered by a reasonable person in the situation, thereby requiring the petitioner to
22 exercise due diligence in bringing forth his motion to reopen. *Id.* at 134. Because neither Ullah
23 nor his counsel offered any statements in the motion to reopen as to why it took ten months
24 beyond the 90-day deadline to file the motion to reopen, it was not an abuse of discretion for the
25 BIA to deny the motion on account of his failure to meet the due diligence requirement. Ullah
26 argues, alternatively, that the BIA should have exercised its *sua sponte* authority under 8 C.F.R.

1 § 1003.2(a) to reopen Ullah's removal proceedings when Ullah demonstrated that ineffective
2 assistance of counsel prejudiced his asylum claim. However, this Court lacks jurisdiction to
3 review the BIA's decision to not to reopen a petitioner's proceedings *sua sponte*. *Ali v.*
4 *Gonzales*, --- F.3d ---, 2006 WL 1304939, at *3 (2d Cir. May 12, 2006).

5 In Ullah's motion to reconsider, he offered evidence that he searched for attorneys soon
6 after the BIA's November 2002 denial of his appeal and retained Attorney Zimmerman in March
7 2003, and that Attorney Zimmerman filed the motion to reopen shortly after recovering from
8 back surgery. Counsel did not indicate why he had failed to file the motion shortly after he was
9 retained by Ullah. The BIA frequently extends briefing deadlines, so it seems that counsel would
10 have been prudent to file the motion sooner and request an extension of time to file his brief and
11 supporting documentation. Therefore, we find that the BIA did not abuse its discretion in finding
12 that Ullah failed to allege circumstances justifying the tolling of the ten months beyond the
13 deadline for filing his motion to reopen.

14 For the foregoing reasons, the petitions for review are DENIED. Having completed our
15 review, any stay of removal that the Court previously granted in these petitions is VACATED,
16 and any pending motion for a stay of removal in these petitions is DENIED as moot. Any
17 pending request for oral argument in these petitions is DENIED in accordance with Federal Rule
18 of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

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20 FOR THE COURT:
21 Roseann B. MacKechnie, Clerk
22

23 By: _____